In the Supreme Court of the United States

OCTOBER TERM, 1970

No. 884

FRANK A. JASKIEWICZ, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner was convicted in the United States District Court for the Eastern District of Pennsylvania of income tax evasion, in violation of Section 7201 of the Internal Revenue Code. He was sentenced to the custody of the Attorney General for a period of six months and fined $5,000. The court of appeals affirmed (Pet. App. C).

A civil audit of petitioner's tax returns, which commenced in 1963, revealed unexplained increases in net worth for the calendar years 1960 to 1963, inclusive. The case was referred to the Intelligence Division for a fraud investigation. The special agent assigned the matter first contacted petitioner's accountant who had prepared the returns, informing

419-106—70

him of the criminal potential of the case. The accountant then arranged a meeting with petitioner, at which the revenue agent and the special agent introduced themselves and warned petitioner of his right to remain silent; however, no warning as to petitioner's right to counsel was given at this or any other time[1] (App. 73a, 350a, 351a, 529a–536a).[2]

After investigation, the matter was referred to a grand jury. Interrogation of petitioner's accountant revealed that petitioner had withheld from him information of tax consequence. An indictment was returned and the conviction followed.

1. Petitioner contends that evidence obtained during a civil tax audit was improperly admitted against him in the instant criminal proceedings since it was procured during "a search for criminal purposes conducted under the guise of an examination for purely civil purposes" (Pet. 9). However, the facts do not support this contention. At the outset, the tax examination was handled by a revenue agent of the Audit Division in the routine manner (Pet. App. C 37b).[3] Upon discovery of unexplained bulges in net worth, the case was referred to the Intelligence Division, at which point petitioner and his accountant were

[1] At all times relevant to the investigation, petitioner had retained counsel with whom he consulted at least one time during the investigation, App. 358a, 574a and 575a).

[2] "App." references are to the separate Appendix to the Briefs in the Court below.

[3] The revenue agent along with others in his audit group were quartered in the same area as members of the Intelligence Division. This was a mere housekeeping matter and changed neither his duties nor his approach to his duties (App. 45a, 198a–200a).

made aware of its criminal potential' (App. 73a, 350a, 351a, 529a–536a). In these circumstances, the Treasury agents went beyond what is required by law, for all that is necessary is that the taxpayer be advised that the examining agents are concerned with the accuracy of his returns. See *United States* v. *Sclafani*, 265 F. 2d 408, 414–415 (C.A. 2), certiorari denied, 360 U.S. 918; *Prudden* v. *United States* 424 F. 2d 1021, 1031–1035, C.A. 5), certiorari denied, October 12, 1970, No. 453, this Term; *United States* v. *Frank*, 245 F. 2d 284, 286 (C.A. 3), certiorari denied, 355 U.S. 819; *Turner* v. *United States*, 222 F. 2d 926, 930–932 (C.A. 4), certiorari denied, 350 U.S. 831; *Biggs* v. *United States*, 246 F. 2d 40, 44 (C.A. 6); *Zacher* v. *United States*, 277 F. 2d 213, 225–226 (C.A. 8), certiorari denied, 350 U.S. 993. Inherent in that advice is the warning that the agents will pursue evidence of misreporting without regard to the shadowy line be-

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'The suggestion in the petition that a mail cover on the petitioner had been established in February 1961 at the request of the Intelligence Division (Pet. 4) is inaccurate. While there was a mail cover in effect as petitioner indicates, this was clearly due to a request by the postal inspector (App. 16a), not the Intelligence Division. Moreover, petitioner is in error when he claims that the mail cover could not be obtained for civil purposes prior to 1965. Section 331.6 of the manual in use during the period February 18, 1961–March 12, 1963, the dates of the instant mail cover, permitted a postal inspector to take such action without reference to civil or criminal matters. In addition, the postal inspector could disseminate information obtained as a result of the mail cover to others without restriction. *United States* v. *Schwartz*, 283 F. 2d 107 (C.A. 3).

The revenue agent who conducted the civil tax audit in the instant case made no use of the mail cover, nor has petitioner attempted to argue otherwise.

tween avoidance and evasion. *United States* v. *Sclafani, supra*, 265 F. 2d at 414–415; *Prudden* v. *United States, supra.*

Petitioner's reliance on *United States* v. *Kordel*, 397 U.S. 1, is misplaced. Indeed, there the Court held that use in a subsequent criminal prosecution of information garnered from a defendant in the ordinary course of a civil proceeding does not by itself violate any constitutional safeguard. The question whether the constitution requires disclosure to the defendant in a civil proceeding that a criminal prosecution is contemplated was not reached in that case (397 U.S. at 12). Nor was it considered in *Smith* v. *Katzenbach*, 351 F. 2d 810, 814 (C.A.D.C.), also cited by petitioner. However, the Second Circuit, in *United States* v. *Sclafani, supra*, met the issue squarely and held, on substantially identical facts, that "failure to disclose the changing course of the investigation is not fraudulent or deceitful" (265 F. 2d at 414).[5] Here, the evidence of disclosure is far stronger than it was in *Sclafani*,[6] and thus there is no warrant for further review.

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[5] The Court in *Sclafani* (265 F. 2d at 414–415) made explicit reference to *United States* v. *Lipschitz*, 117 F. Supp. 466 (E.D.N.Y.), on which petitioner places heavy reliance here, as being of questionable authority. With regard to the other decision relied upon by petitioner, *United States* v. *Guerrina*, 112 F. Supp. 126, 128 (E.D. Pa.), so much of the suppression order as there was based upon a failure to inform the taxpayer of his constitutional rights was subsequently vacated by the same judge in *United States* v. *Guerrina*, 126 F. Supp. 609, 610.

[6] In that case, apparently the only disclosure was through the introduction to petitioner of a Mr. Silbert as "special agent," which, it was there argued, apprised the petitioner that Silbert was connected with the Intelligence Division.

2. Petitioner attacks the court of appeals' holding that he was not entitled to *Miranda* warnings at the time the special agent entered the investigation because he was neither in custody nor otherwise deprived of his freedom in any significant way. However, this determination is in accord with the rule in every circuit except the Seventh. *Morgan* v. *United States*, 377 F. 2d 507, 508 (C.A. 1); *United States* v. *White*, 417 F. 2d 89 (C.A. 2), certiorari denied, 397 U.S. 912; *United States* v. *Squeri*, 398 F. 2d 785, 788–790 (C.A. 2); *United States V. Caiello*, 420 F. 2d 471 (C.A. 2), certiorari denied, 397 U.S. 1039; *United States* v. *Mancuso*, 378 F. 2d 612, 618 (C.A. 4), certiorari denied, 390 U.S. 955; *Prudden* v. *United States*, *supra*; *Agoranos* v. *United States*, 409 F. 2d 833, 835, certiorari denied, 396 U.S. 824; *United States* v. *Miriani*, 422 F. 2d 150, 153–154 (C.A. 6), certiorari denied, 399 U.S. 910; *United States* v. *Maius*, 378 F. 2d 716, 718–719 (C.A. 6), certiorari denied, 389 U.S. 905; *Cohen* v. *United States*, 405 F. 2d 34 (C.A. 8), certiorari denied, 394 U.S. 943; *Feichtmeir* v. *United States*, 389 F. 2d 498 (C.A. 9), *Hensley* v. *United States*, 406 F. 2d 481, 484 (C.A. 10).

In the only contrary holding, *United States* v. *Dickerson*, 413 F. 2d 1111, 1117 (C.A. 7), the court upheld a suppression order on the ground that a taxpayer must be given *Miranda* warnings "at the inception of the first contact with the taxpayer after the case had been transferred to the Intelligence Division"; but the holding was expressly limited only to "interrogations taking place after [July 28, 1969] the

date of this decision" 413 F. 2d at 1117. Thus, even if the *Dickerson* rule were applied to the case at bar, the evidence should not be suppressed since it was obtained in 1963 and 1964.

In view of the purely prospective nature of the *Dickerson* holding and the present policy of the Internal Revenue Service to give virtually full *Miranda* warnings to all taxpayers when they are first interviewed by a special agent,[7] there should be few, if any, future cases which will meet a different fate in the Seventh Circuit than in any other circuit. See *United States* v. *Campione*, 416 F. 2d 486 (C.A. 7), certiorari denied, 397 U.S. 909; *United States* v. *Gallagher*, C.A. 7, No. 18000, and *United States* v. *Townsend*, C.A. 7, No. 18159, both decided July 9, 1970.[8] The conflict, therefore, does not warrant further review by this Court.

For the reasons stated, the petition for a writ of certiorari should therefore be denied.

Respectfully submitted,

ERWIN N. GRISWOLD,
Solicitor General.

November 1970.

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[7] By news release dated November 26, 1968, the Internal Revenue Service announced that henceforth a special agent on his first visit to a taxpayer must warn him of his constitutional rights, including the right to counsel, but not including the proffer of legal aid unless the taxpayer is in custody. The news release notes that this "new procedure goes beyond most legal requirements that are designed to advise persons of their rights." 1968 CCH Fed. Tax Reporter, par. 6946; 1968 Prentice-Hall Fed. Taxes, par. 55476.

[8] A petition for certiorari is pending in *Townsend*, No. 708, this Term.

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